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5 UNITED STATES DISTRICT COURT  
6 WESTERN DISTRICT OF WASHINGTON  
7 AT SEATTLE

8 WILBERT G. REID and DIANE  
9 REID, husband and wife,

10 Plaintiffs,

11 v.

12 COUNTRYWIDE HOME LOANS,  
13 INC. N/K/A BAC HOME LOAN  
SERVICING, L.P.; et al.,

14 Defendants.

C13-436 TSZ

ORDER

15 THIS MATTER comes before the Court on Defendants' Motion to Dismiss  
16 Plaintiffs' Complaint, docket no. 6. Having considered the motion and all pleadings filed  
17 in support of and opposition to the motion, the Court enters the following Order.

18 **Background**

19 On February 22, 2007, Plaintiffs Wilbert and Diane Reid purchased property with  
20 a loan from Defendant Countrywide Home Loans, Inc. ("Countrywide"). Complaint,  
21 docket no. 1 Ex. A, ¶ 3.2. Plaintiffs executed a Deed of Trust securing the loan which  
22 identified Countrywide as the lender, LS Title of Washington as the Trustee, and  
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1 Defendant Mortgage Electronic Registration System, Inc. (“MERS”) as the beneficiary.  
2 Compl. Ex. 2. On July 22, 2009, MERS recorded an Appointment of Successor Trustee,  
3 appointing Defendant ReconTrust Company, N.A. (“ReconTrust”) as Trustee.<sup>1</sup> Id. Ex. 3.  
4 On March 12, 2010, MERS recorded a Corporation Assignment of Deed of Trust  
5 assigning its beneficial interest to Defendant BAC Home Loans Servicing, L.P. (BAC).  
6 Id. On March 19, 2010, ReconTrust recorded a Notice of Trustee Sale scheduling a sale  
7 of Plaintiffs’ property for June 18, 2010, and listing total loan arrears of \$228,932.68. Id.  
8 The property was sold to BAC on June 19, 2010. Compl. ¶¶ 3.3, 3.7; Ex. 3. BAC  
9 conveyed Plaintiffs’ property to a third party on April 20, 2011. Compl. ¶ 3.8.

10 Plaintiffs brought suit against Defendants in King County Superior court on  
11 January 30, 2013. Notice of Removal, docket no. 1. Plaintiffs allege five causes of  
12 action: (1) Misrepresentation; (2) Unfair Deceptive Acts and Practices in violation of  
13 Washington Consumer Protection Act (“CPA”); (3) Breach of Good Faith; (4)  
14 Negligence; and (5) Emotional Distress. Compl. at pp. 13 – 17.

## 15 **Discussion**

### 16 **A. Standard of Review**

17 In order to survive a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules  
18 of Civil Procedure, a plaintiff must allege “enough facts to state a claim for relief that is  
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20 <sup>1</sup> Plaintiffs assert that each of the recorded documents was improperly executed because the documents  
21 were “robo-signed” and notarized after signing. For example, the Appointment of Successor Trustee was  
22 executed on June 30, 2008, notarized on July 1, 2009, and recorded on July 22, 2009. Compl. Ex. 3.  
23 Plaintiffs also assert that MERS was not authorized to appoint a successor trustee because MERS was not  
a beneficiary with that authority. The Court does not reach these issues in deciding the pending motion.

1 plausible on its face.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). Dismissal  
2 is proper under Rule 12(b)(6) “if it appears beyond doubt that the plaintiff can prove no  
3 set of facts to support his claims.” Manshardt v. Fed. Judicial Qualifications Comm., 408  
4 F.3d 1154, 1156 (9th Cir. 2005). In reviewing the adequacy of the complaint, the Court  
5 must accept all well-pleaded allegations as true, South Ferry LP, No. 2 v. Killinger, 542  
6 F.3d 776, 782 (9th Cir. 2008), and draw all reasonable inferences in favor of the plaintiff.  
7 Twombly, 550 U.S. at 555. In other words, “[t]o survive a motion to dismiss, a  
8 complaint must contain sufficient factual matter, accepted as true, to state a claim to relief  
9 that is plausible on its face.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (internal  
10 quotation omitted).

#### 11 **B. Waiver of Claims**

12 Defendants ask that Plaintiffs’ claims for breach of good faith, negligence, and  
13 emotional distress be dismissed as waived because Plaintiffs failed to enjoin the  
14 foreclosure sale. Plaintiffs argue that waiver is an equitable doctrine and should not be  
15 applied in this case.

16 It is undisputed that Plaintiffs failed to pursue presale remedies provided for in RCW  
17 § 61.24.130. “Waiver is an equitable principle that can apply to defeat someone’s legal  
18 rights where the facts support an argument that the party relinquished their rights by  
19 delaying in asserting or failing to assert an otherwise available adequate remedy.” Albice  
20 v. Premier Mortg. Servs. of Wash., Inc., 174 Wn.2d 560, 569 (2012). In the foreclosure  
21 setting, “waiver of any postsale challenge occurs where a party (1) received notice of the  
22 right to enjoin the sale, (2) had actual or constructive knowledge of a defense to  
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1 foreclosure prior to the sale, and (3) failed to bring an action to obtain a court order  
2 enjoining the sale.” Id. (quoting Plein v. Lackey, 149 Wn.2d 214, 227, (2003)).

3 The courts should “apply waiver only where it is equitable under the circumstances  
4 and where it serves the goals of the [Washington Deed of Trust Act].” Id. The three  
5 goals of the Act are “efficiency, ensuring an adequate opportunity to prevent wrongful  
6 foreclosure, and promoting the stability of land titles.” Tran v. Bank of Am., N.A., 2012  
7 U.S. Dist. LEXIS 157165, 7-8 (W.D. Wash. Nov. 1, 2012) (citing Albice, 174 Wn.2d at  
8 567, 569). “[I]n determining whether waiver applies, the second goal—that the  
9 nonjudicial foreclosure process should result in...interested parties having an adequate  
10 opportunity to prevent wrongful foreclosure—becomes particularly important.” Albice,  
11 174 Wn.2d at 571.

12 The Court holds that application of waiver is proper and equitable under the  
13 circumstances of this case and dismisses Plaintiffs’ claims for breach of good faith,  
14 negligence, and emotional distress with prejudice. Plaintiffs have not alleged any facts  
15 showing that they were not given an adequate opportunity to prevent the foreclosure.  
16 Plaintiffs have not disputed that they received notice of the trustee sale and have not  
17 alleged that there were any barriers preventing them from seeking a presale injunction.  
18 Plaintiffs argue that they were not aware of Defendants’ allegedly wrongful conduct until  
19 their documents were reviewed in late 2012, however, all of the documents giving rise to  
20 the Plaintiffs’ claims were in their possession and Plaintiffs fail to show any reason they  
21 were unable to pursue presale remedies at the time of the foreclosure.  
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1       **C. Statute of Limitations**

2       Defendants also ask that Plaintiffs' claims for misrepresentation and violations of the  
3 CPA be dismissed as time-barred pursuant to RCW § 61.24.127(2), which requires that  
4 such claims "must be asserted or brought within two years from the date of the  
5 foreclosure sale or within the applicable statute of limitations for such claim, whichever  
6 expires earlier." Plaintiffs argue that they are not subject to the two-year limitation  
7 because the discovery rule should apply to preserve their claims against the Defendants.

8       The discovery rule "tolls the running of the statute of limitations until the plaintiff has  
9 knowledge of the "facts" which give rise to the cause of action; it does not require  
10 knowledge of the existence of a legal cause of action itself." Richardson v. Denend, 59  
11 Wn. App. 92, 95-96 (1990). The discovery rule exists because a statute of limitations  
12 does not begin to run until a cause of action "accrues," and in some cases a cause may not  
13 accrue immediately if the plaintiff does not have knowledge of the facts giving rise to the  
14 cause of action. Gazija v. Nicholas Jerns Co., 86 Wn.2d 215, 219 (1975).

15       The discovery rule does not apply to toll the two-year limitation provided by RCW §  
16 61.24.127(2) because the statute does not state that a claim must be brought within two  
17 years from the date a claim accrues. Rather, the statute plainly states that the claim must  
18 be "brought within two years from the *date of the foreclosure sale*." RCW §  
19 61.24.127(2) (emphasis added). Because the Plaintiffs failed to bring their claims of  
20 misrepresentation and violation of the CPA within two years from the date of the  
21 foreclosure sale, Plaintiffs claims are time-barred and will be dismissed with prejudice.  
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1       **D. Leave to Amend Complaint**

2       Plaintiffs request that leave be granted to amend the Complaint, but the deficiencies in  
3 the Complaint cannot be cured by amendment and the Court holds that granting leave to  
4 amend would be futile. See Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000) (“court  
5 should grant leave to amend...unless it determines that the pleading could not possibly be  
6 cured by the allegation of other facts.”).

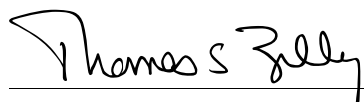
7       **Conclusion**

8       The Court holds that Plaintiffs’ claims for breach of good faith, negligence, and  
9 emotional distress have been waived by Plaintiffs’ failure to pursue presale remedies  
10 available prior to the foreclosure. In addition, the Court holds that Plaintiffs’ claims for  
11 misrepresentation and violations of the CPA are time-barred pursuant to RCW §  
12 61.24.127(2) because the claims were not brought within two years from the date of the  
13 foreclosure sale. The Court holds that Plaintiffs’ request to amend the Complaint is futile  
14 because the pleading could not be cured by the allegation of other facts. The Court  
15 GRANTS Defendants’ Motion to Dismiss, docket no. 6, and DISMISSES Plaintiffs’  
16 claims with prejudice and without leave to amend.

17       IT IS SO ORDERED.

18       The Clerk is directed to send a copy of this Order to all counsel of record.

19       Dated this 10th day of May, 2013.

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22       THOMAS S. ZILLY  
23       United States District Judge